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Supreme Court of the United States

October Term, 1955

No. 314

SARA BILLINGS BOARDMAN SMITH, Executrix of the last Will and Testament of HARVEY A. SMITH, Deceased

Appellant

vs.

JOSEPH B. WISSLER, President Judge, and H. CLAY BURKHOLDER, Additional Law Judge, of the COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA,

Appellees

Appeal from the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1955

NO. 314

Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, Deceased,
Appellant

vs.

Joseph B. Wissler, President Judge, and H. Clay Burkholder, Additional Law Judge, of the Court of Common Pleas of Lancaster County, Pennsylvania,
Appellees

I.
MOTION TO DISMISS APPEAL

Joseph B. Wissler, President Judge, and H. Clay Burkholder, Additional Law Judge, of the Court of Common Pleas of Lancaster County, Pennsylvania, by Paul A. Mueller, their counsel, moves the Supreme Court of the United States to dismiss the appeal of Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, deceased, from the judgment of the Supreme Court of Pennsylvania in Smith Case, 381 Pa. 223, 112 A. 2d 625 (1955).

II.
NATURE OF THE CASE AND RULING BELOW

By the Act of January 14, 1951 (1952), P. L. 2087, 5 P. S. 30, Supp. et seq., the Legislature of the Commonwealth of Pennsylvania amended the Act of June 16, 1836, P. L. 715, 5 P. S. 21 et seq., so as to empower any Court of Common Pleas by rule to provide that civil cases involving a claim of One Thousand ($1,000.00) Dollars or less must first be submitted to a board of three arbitrators for decision, reserving the right of any dissatisfied litigant to appeal for a jury trial upon his prior payment of the fees of the arbitrators. Pursuant to the power of this Act of Assembly the Court of Common Pleas of Lancaster County adopted Rules of Court applying the Act of Assembly to suits involving a claim of Five Hundred ($500.00) Dollars or less and fixing the arbitrators fees at Twenty-Five ($25.00) Dollars each or a total of Seventy-Five ($75.00) Dollars.

Harvey A. Smith, having brought a suit on a claim for Two Hundred Forty-nine and 19/100 ($249.19) Dollars filed a petition for a writ of prohibition in the Supreme Court of Pennsylvania in order to test the constitutionality of the 1951 Act, without ever having submitted his cause to a board of arbitrators for prior determination as therein provided. On rule granted, and after argument and briefs filed, the Supreme Court of Pennsylvania rendered

a judgment sustaining the constitutionality of the 1951 Act and of the Rules of the Court of Common Pleas of Lancaster County issued pursuant thereto. In its majority opinion the Supreme Court of Pennsylvania suggested certain changes to the Rules of Court which have since been made. The minority opinion of the Supreme Court of Pennsylvania upheld the constitutionality of the Act of Assembly, but stated that the original rules of court violated both the statute and the constitution.

From this judgment, Harvey A. Smith having since died, the present appellant, as his executrix, seeks review in this appeal by the Supreme Court of the United States.

III.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(A) There is no substantial federal question presented in this appeal.

Appellant contends that she is being deprived of her constitutional rights of due process and of a jury trial.

Insofar as due process is concerned, it is submitted that appellant has all her rights preserved and guaranteed by this Act. Appellant has a right of hearing, right to a jury trial, right of appeal, oral argument, and a right to meet all issues at all times in her litigation. As a matter of fact appellant has not even had her claim passed upon by a board of arbitrators.

Insofar as her constitutional right to a jury trial is concerned, the 7th Amendment only applies to trials in federal courts. See, *Walker vs. Sauvinet,* 92 U.S. 90, 23 L. Ed. 678 (1876); *Pearson vs. Yewdall,* 95 U.S. 294, 24 L. Ed. 436 (1877).

There is, therefore, no substantial federal question involved.

Consolidated Turnpike Company vs. Norfolk & Ocean View Railroad Company, 228 U.S. 596, 33 S. Ct. 605, 57 L. Ed. 982 (1913);

Tyler vs. Judges of Court of Registration, 179 U.S. 405, 21 S. Ct. 206, 45 L. Ed. 252 (1900);

Capital Traction Co. v. Hof, 174 U.S. 1, 19 S. Ct. 580, 43 L. Ed. 873 (1899).

(B) The judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

By the express terms of the Act of Assembly involved, appellant can get a jury trial and the Supreme Court of Pennsylvania has decided that the Act does not violate the Pennsylvania constitution. Appellant is really complaining that if she loses before the arbitrators, and is successful on appeal after a jury trial, she cannot get back the arbitration fees she had to pay as a condition precedent to the appeal. In Pennsylvania the right to recover costs in litigations is a matter of statute and not one either of common law or constitutional right. See, *Morganroth's Election Contest Case,* 346 Pa. 327, 29 A. 2d 502 (1943); *Grim v. Weissenberg School District,* 57 Pa. 433 (1868); *Tunison vs. Commonwealth,* 347 Pa. 76, 31 A. 2d 521 (1943).

Where the judgment of the Supreme Court of a state is clearly supported on non-federal grounds this court will not take jurisdiction.

Eustis vs. Bolles et al., 150 U.S. 361, 14 S. Ct. 131, 37 L. Ed. 1111 (1893);

Enterprise Irrigation District et al. vs. Farmers Mutual Canal Co. et al., 243 U.S. 157, 37 S. Ct. 318, 61 L. Ed. 644 (1916);

Howat vs. State of Kansas, 258 U.S. 181, 42 S. Ct. 277, 66 L. Ed. 550 (1921);

Lynch vs. New York, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934).

CONCLUSION

The appeal of Sara Billings Boardman Smith, Executrix of the last Will and Testament of Harvey A. Smith, deceased, should be dismissed because (1) there is no substantial federal question presented in this appeal, and (2) the judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

Respectfully submitted,

PAUL A. MUELLER,
Counsel.

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SEP 23 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 314 October Term, 1955

SARA BILLINGS BOARDMAN SMITH, Executrix of the last Will and Testament of HARVEY A. SMITH, Deceased

Appellant

vs.

JOSEPH B. WISSLER, President Judge, and H. CLAY BURKHOLDER, Additional Law Judge, of the COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA,

Appellees

Appeal from the Supreme Court of Pennsylvania.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS APPEAL

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STATUTE:

Constitution of Pennsylvania, Art. I, Sec. 11 4

ARGUMENT FOR APPELLANT

A. WHETHER THE FEDERAL QUESTION IS SUBSTANTIAL

As we understand appellees' argument, it is that because a right of appeal from the Boards of Arbitration is provided by the Pennsylvania Statute and the Rule of Court, appellant is not deprived of due process. By implication they concede that *without a right of appeal* from the arbitrators appellant *would be* deprived of due process, and this the Supreme Court of Pennsylvania conceded.[1] But the real question is, Is the right of appeal provided unsubstantial and illusory? Does the Statute deprive a large class of litigants, including appellant, of the right to litigate their claims before a *judicial* tribunal?

We have never contended that the Federal Constitution guaranteed trial by jury in State courts. We do contend that compulsory arbitration of civil rights of action before an irregularly constituted tribunal, without the safeguards of a court of law and of record, is a violation, not of the Seventh Amendment, but of the Due Process Clause of the Fourteenth Amendment.

Aside from the fact that deprivation by a State of the civil rights of a single individual guaranteed by

[1] Opinion of Supreme Court of Pennsylvania. Jurisdictional Statement, p. 21.

the Federal Constitution presents a substantial federal question, the preeminent importance of this case and of the federal questions raised by it, lies in the fact, as stated in our Jurisdictional Statement, that this Statute is but the entering wedge for removing a class of litigants that will grow ever larger from those entitled to have their causes tried judicially, i.e., according to the course of the common law, which means due process.

As to the suggestion that appellant was not deprived of due process because she did not first have her case passed on by arbitrators, it is sufficient to say that this suggestion is now made for the first time and was not made in the Court below, that that Court assumed she had a right to have the constitutional question decided *in limine* and did in fact pass upon and uphold the constitutionality of the Statute and the Rule. It would have been a mockery to have raised in the Court of first instance the question of the validity of the Rule adopted by that Court, after, we must assume, due deliberation, or to have raised there the question of the validity of the Statute under which the Rule was adopted, without a conviction of the validity of which it would certainly not have been adopted. Surely it was not necessary for appellant to undertake the expense and inconvenience of a trial before arbitrators when the result, whether win or lose, would have been a vain thing. Must a citizen subject himself to a proceeding at which every fibre of his being rebels, in order to attack the validity of that very proceeding, or can he, by resorting to established procedures, invoke the protection of the higher courts

against that form of oppression? In this day and in this country there can be but one answer.

B. DOES THE JUDGMENT BELOW REST ON A NON-FEDERAL BASIS?

We confess we do not understand the argument for the appellees on this point.

The objections that the Statute and the Rule of Court violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment were raised in the Court below at the very outset of the proceeding. That Court agreed that the Statute and Rule would violate the Due Process clause as compulsory arbitration but for the provision for an appeal, and held that the appeal provided rendered the Statute and Rule valid. It is true the judge who wrote the opinion did not discuss the federal question, other than to state that the Statute would be unconstitutional if it provided for compulsory arbitration, *but the federal question could not have been more squarely decided.*[2] The fact that the Court below also held that the Statute and Rule did not violate the State Constitution does not establish a nonfederal basis for its decision. It is

[2] "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect." *Oyama v. State of California*, 332 U. S. 633, at 636; 68 S. Ct. 269 (1948). To the same effect is *Norris v. State of Alabama*, 294 U. S. 587; 55 S. Ct. 579 (1934).

begging the question to argue that a decision that the Statute and Rule were valid under the State Constitution is a decision on a nonfederal ground, when their validity under the Federal Constitution was challenged and the decision was that the Statute and Rule were valid. In this connection it may be noted that the provisions of the State Constitution relating to due process are in effect the equivalent of those of the Fourteenth Amendment.[3]

The question of *costs* referred to by the appellees is likewise beside the point. In the first place, the arbitrators' fees are not costs. *It is expressly so declared by the Statute.*[4] It had been held before that such charges are *administrative expenses* and should be borne by the governments involved.[5] The Court below recognized that in this case.[6] But even if the arbitrators' fees had been costs, the doctrine that the right to recover costs is of purely statutory origin has nothing to do with this case. The question here is whether the deliberate imposition of such fees as prerequisite to

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[3] "Every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay". *Constitution of Pennsylvania*, Art. I, Sec. 11.

[4] Secs. 4 and 5 of the Act of 1952. Jurisdictional Statement, pp. 35, 36.

[5] *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, at 499; 7 A. 2d 302 (1939).

[6] Opinion below. See Jurisdictional Statement, p. 23: ". . . if, therefore, the right to recover costs may be withheld by the legislature without infringing the Constitution *it would seem* that the right to recover the compensation paid the arbitrators *which is an administrative expense*, may similarly be withheld". (Italics ours)

the right to appeal is a penalty and a confiscatory one and, if it is, whether it constitutes a deprivation of due process.[7]

If the Court below had held that the case should be decided against appellant because she had not first submitted her case to arbitration, there might be some semblance of basis for an argument that the decision was on a nonfederal ground, although even then there would remain the question whether or not the nonfederal ground was substantial.[8] However, the Supreme Court of Pennsylvania specifically did *not* decide the case on that ground. It deliberately decided it on the merits and passed on the constitutionality of the Act and the Rule of Court. It could not have done otherwise and followed its prior decisions. It had held that it exercised a general supervisory jurisdiction over the Courts of Common Pleas and Quarter Sessions of Pennsylvania, with power to correct and prohibit unlawful and oppressive procedures.[9] It had specifically held that in arbitration cases the question whether a case is arbitrable is to be decided *in limine* and that litigants do not first have to submit to arbi-

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[7] This question was decided in accordance with our contention in *St. Louis I. M. & S. Railway Co. v. Williams*, 49 Ark. 492; 5 S.W. 883 (1887), a case practically on all fours with the case at Bar. Cited in *Gulf, Colo. & Santa Fe Rwy. v. Ellis*, 165 U. S. 150 (1897). See also *Malin v. LaMoure County*, 27 N.D. 140; 145 N.W. 582 (1914).

[8] *DeMorest v. City Bank Farmers Trust Co.*, 321 U. S. 36; 64 Sup. Ct. 384 (1944).

[9] *McNair's Petition*, 324 Pa. 48; 187 A. 498 (1936), where the Supreme Court of Pennsylvania awarded writs of Prohibition and Mandamus to halt an oppressive Grand Jury investigation.

tration and then appeal.[10] As the Court below decided this case, to go back before arbitrators now and take successive appeals would not only be oppressive, but would be going through meaningless motions, as the question is *res adjudicata*. So far as the State Courts are concerned, the *federal* question *has been decided* by the highest Court of the State. Appellant's only recourse is in this Court.[11]

Moreover, Appellant's testator, the original plaintiff, could not, under this Statute and Rule of Court, have gotten his case up for trial at all except by listing it for trial before the arbitrators (Section 5 of the Rule, Jurisdictional Statement, p. 39). Cases under the prescribed amount listed for trial in court were to be struck off the trial list (Section 19 of the Rule, Jurisdictional Statement, p. 44). Appellant's case *was* listed for trial and *was* struck off the list by the Prothonotary, who is merely a ministerial officer of the Court of Common Pleas. To have sought a mandamus against the Prothonotary in that court would have been to ask the court to decide against its own Rule and to have made it a judge in its own cause. Appellant's testator had only two other courses: one, to seek redress from the Supreme Court of Pennsylvania by

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[10] *Goldstein v. International Ladies' Garment Workers Union*, 328 Pa. 385; 196 A. 43 (1938). See also *Pennsylvania Railroad Co. v. Driscoll*, 330 Pa. 97; 196 A. 43 (1938). *Harris v. State Board of Optometrical Examiners*, 287 Pa. 531, 534; 135 A. 237 (1926).

[11] *Laurence v. State Tax Commission of Mississippi*, 286 U. S. 276; 52 S. Ct. 556 (1932), where a somewhat similar situation arose.

invoking well established procedures, which he did, or, two, by listing his case for trial before arbitrators. Had he pursued the latter course, he would, by resorting to the procedures established by the Statute and Rule of Court, have waived his right to object to their unconstitutionality.[12] This the court below recognized and therefore decided the question of the validity of the Statute and Rule.

It is respectfully submitted that the Motion to Dismiss the Appeal should be denied.

ROBERT RUPPIN,
Counsel for Appellant.

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[12] *Hurley v. Commission of Fisheries*, 257 U. S. 223; 42 S. Ct. 83 (1921). *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. 125; 42 S. Ct. 440 (1922); *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407; 37 S. Ct. 609 (1916); *St. Louis Malleable Casting Co. v. Prendergast Construction Co.*, 260 U. S. 469; 43 S. Ct. 178 (1923).